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**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF ARIZONA**

United States of America,

Plaintiff,

vs.

Gear Box Z, Inc.,

Defendant

Case No.: 3:20-cv-08003-JJT

**DEFENDANT’S MEMORANDUM  
IN OPPOSITION TO PLAINTIFF’S  
MOTION FOR PRELIMINARY  
INJUNCTION**

Honorable John J. Tuchi

The Defendant Gear Box Z, Inc., (“Gear Box”), by and through its undersigned counsel, hereby submits its Memorandum in Opposition to Plaintiff’s Motion for Preliminary Injunction. Plaintiff, United States of America, hereinafter referred to as “the EPA,” filed a motion for preliminary injunction seeking to enjoin Gear Box from selling its products and conducting business operations.

The EPA’s motion for a preliminary injunction should be denied because Gear Box’s products are legal and are sold under the “maintenance exception” and other exceptions allowed under the Clean Air Act. In addition, The EPA filed its motion only upon learning that Gear Box qualified and received a Paycheck Protection Program loan from the Small Business Administration. The EPA filed its motion in

1 bad faith because it could not litigate Gear Box into bankruptcy. Furthermore, the EPA  
2 was not diligent in its pursuit of an injunction by waiting nearly three years to file.  
3 Under the circumstances mentioned above, the EPA's motion for preliminary  
4 injunction should be denied in its entirety.

5 **MEMORANDUM IN SUPPORT**

6 In April 2017, the EPA sent notification to Gear Box Z, Inc., ("Gear Box") of its  
7 investigation regarding the products it manufactures and sells on its website. Gear Box  
8 fully cooperated with the EPA and its investigation. After the EPA completed its  
9 investigation the EPA sent a Notice of Violation ("NOV") in December 2017, to Gear  
10 Box alleging that certain products it sold were in violation of the Clean Air Act  
11 ("CAA"), U.S.C. § 7522(a)(3)(B).

12 The NOV alleged that Gear Box product numbers AFEGMP4F, AFEFP4F,  
13 AFEDP4F, AFEDPCC, AFEDP, AFEDP2, AFEGMP-CCLB, AFEGMP-CCSB and  
14 AFEGMP-ECSB ("Exhaust Pipes"), GBZ-FBP ("Block Plates") and GBZ-DD30  
15 ("DPF Emulator") were in violation of the CAA. The NOV stated that the EPA may  
16 bring an enforcement action against Gear Box for civil penalties exceeding  
17 \$6,000,000.00 under the provisions of 40 CFR 19.4.

18 Gear Box is not in violation of the CAA. Gear Box's products listed in the NOV  
19 fall under exceptions listed in U.S.C. § 7522 and other portions of the CAA. The  
20 exception commonly known as the "maintenance exception" specifically states that any  
21 device used for repair or maintenance, that can be removed and thereafter results in the  
22

1 proper functioning of the original device or element of design shall not be treated as a  
2 prohibited act under the CAA.

3 Despite this contention, the EPA waited more than two years after the NOV to  
4 file its complaint alleging violations of the CAA, U.S.C. § 7522(a)(3)(B). The  
5 allegations in the Complaint mentions the Block Plates, Exhaust Pipes and the DPF  
6 Emulator. The Complaint also alleges that Gear Box's software products ("Tunes") are  
7 also in violation of the CAA. The Complaint, however, failed to state which of Gear  
8 Box's software (Tune) products are alleged to be in violation of the CAA. EPA's  
9 Fourth Claim for Relief only refers to Gear Box products as Defeat Tune Products, but  
10 failed to articulate which Gear Box product it referred to.

11 On April 15, 2020, Gear Box filed its answer and again informed the EPA, that  
12 Gear Box does not manufacture nor sell products that are in violation of the CAA.  
13 Gear Box manufactures and sells products that are sold with the intention that they be  
14 used for legal purposes under the CAA.

15 There are numerous uses for Gear Box's products that are not prohibited under  
16 the CAA. The most notable exception under the CAA is for products that are used for  
17 maintenance and repair that are fully reversable upon completion of the procedure.  
18 Other exceptions to the CAA, among many, include products that are sold to the  
19 military, products used for racing and products for motor vehicles that are primarily  
20 used for emergency purposes, such as ambulance and fire trucks.

21 The EPA does not address the many exceptions under the CAA that are  
22 applicable to Gear Box's products. The EPA is only seeking a preliminary injunction

1 after it discovered that Gear Box qualified and received an SBA loan, more  
2 appropriately known as the Paycheck Protection Program, (“PPP Loan”).<sup>1</sup> Only after  
3 Gear Box obtained a PPP Loan does the EPA claim it will suffer irreparable harm if  
4 Gear Box continues to sell its products. If the EPA were actually concerned about  
5 irreparable harm, the EPA would have filed a lawsuit immediately after the NOV and  
6 then, without waiting, seek a preliminary injunction. Instead the EPA waited for more  
7 than 2 years before it filed suit and only sought for the preliminary injunction after it  
8 discovered that Gear Box obtained a PPP Loan. The EPA’s argument that it will suffer  
9 irreparable harm if Gear Box continued to sells its products is meritless. The EPA’s  
10 delay shows there is no imminent danger to the public health and waiting for trial to  
11 decide the case on the merits will not result in irreparable harm.

12 A preliminary injunction is an extraordinary measure that should be not used as  
13 an instrument to defeat trial. A preliminary injunction should only be granted if the  
14 EPA is likely to proceed on the merits, suffer irreparable injury, the balance of  
15 hardships tips in its favor and an injunction serves the public interest. The EPA cannot  
16 satisfy any element needed to succeed on a preliminary injunction. Therefore, EPA’s  
17 Motion for Preliminary Injunction should be denied and the case should proceed and be  
18 decided on the merits at trial.

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<sup>1</sup> Paycheck Protection Program SBA Loan, initiated by the 116th Congress under the “CARES Act” intended to provide economic relief to small businesses that suffered from the effects of the current pandemic.

## ARGUMENT

“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. NRDC, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 374 (2008).

The Court should deny EPA’s motion for preliminary injunction because the EPA will not succeed on the merits, it will not suffer irreparable harm, the balance of equities is not in the EPA’s favor and a preliminary injunction is not in the public interest.

### **I. Likelihood of Success on the Merits.**

The EPA is *not* likely to succeed on the merits because it does not consider any of the exceptions in the CAA that are applicable to Gear Box. The EPA alleges in its complaint that Gear Box violated the CAA, 42 U.S.C. § 7522(a)(3)(B) by manufacturing, selling or offering to sell certain aftermarket products, such as EGR block plates<sup>2</sup>, exhaust replacement pipes<sup>3</sup>, DPF emulators<sup>4</sup> and tunes<sup>5</sup>.

42 U.S.C.S. § 7522(a)(3)(B) prohibits:

“any person to manufacture or sell, or offer to sell, or install, any part or component intended for use with, or as part of, any motor vehicle or motor vehicle engine, where a principal effect of the part or component is to bypass, defeat, or render inoperative any device or element of design installed on or in

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<sup>2</sup> Complaint ECF 1, Count I, ¶¶ 55-56.

<sup>3</sup> Complaint ECF 1, Count II, ¶ 65.

<sup>4</sup> Complaint ECF 1, Count III, ¶ 74.

<sup>5</sup> Complaint ECF 1, Count IV, ¶ 83.

1 a motor vehicle or motor vehicle engine in compliance with  
2 regulations under this title, and where the person knows or  
3 should know that such part or component is being offered for  
4 sale or installed for such use or put to such use.”

5 The exception to 42 U.S.C.S. § 7522(a)(3), specifically provides that “[n]o  
6 action with respect to any device or element of design . . . shall be treated as a  
7 prohibited act if,

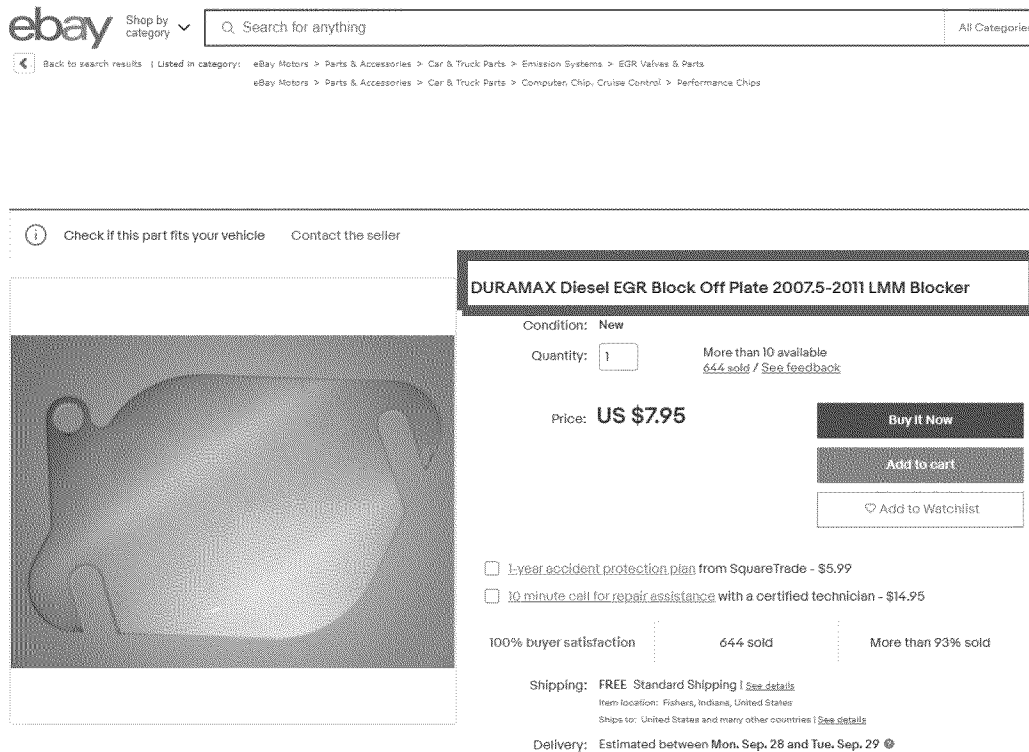
8 (i) that action is for the purpose of repair or replacement of the device or  
9 element, or is a necessary and temporary procedure to repair or replace any other item  
10 and the device or element is replaced upon completion of the procedure, and

11 (ii) such action thereafter results in the proper functioning of the device or  
12 element.”

13 Gear Box’s emissions related products are to be used for legal purposes, such as,  
14 maintenance and repair. (Declaration of Jerry Black “Jerry Black Decl.” attached  
15 hereto as Exhibit A.) “Jerry Black Decl.” ¶ 14. Gear Box’s products are fully  
16 reversable to the original or proper functioning of the device or element of design after  
17 the maintenance or repair procedure is complete. Jerry Black Decl. ¶ 18.

18 The Block Plates (GBZ-FBP) are used as a temporary procedure for the  
19 maintenance or repair of a motor vehicle and are easily removed by loosening two  
20 bolts, and upon completion of the procedure, will result in the proper functioning of a  
21 motor vehicles original equipment manufacturer (“OEM”)’s emission system. Jerry  
22 Black Decl. ¶ 19. The Block Plates sold by Gear Box is a common product that can be

ordered from online suppliers through a marketplace where thousands of these block plates are sold, as shown below:




The Exhaust Pipes must be used in conjunction with the Block Plates and Tunes as a temporary procedure for maintenance or repair of a motor vehicle. The Exhaust Pipes are similar to the Block Plates in that they are easily removed upon completion of the procedure. The Exhaust Pipes are not manufactured by Gear Box but are commonly ordered from online suppliers, such as eBay, and are drop shipped directly to the customer from the supplier. See below:

1 **ebay** Shop by category  All Categories

2 [Back to search results](#) | Listed in category: eBay Motors > Parts & Accessories > Car & Truck Parts > Exhaust > Exhaust Systems > See more "Exhaust System Kit-5" Down Pipe Back Single R...

3

4 ☒ Check if this part fits your vehicle

5 

6 **FLOPRO 664NM 5" Downpipe Back No Muffler DPF DELETE 11-15 Duramax 6.6L Chev GMC**

7 1 viewed per hour ★★★★★ Be the first to write a review.

8 Condition: **New**

9 Compatibility: [See compatible vehicles](#)

10 Quantity:  4 available 44 sold / [See feedback](#)

11 Price: **US \$489.95**  
\$41 for 12 months with PayPal Credit

12


13 ☐ 1-year accident protection plan from SquareTrade - \$52.99

14 ☐ 10 minute call for repair assistance with a certified technician - \$14.95

15 100% buyer satisfaction 44 sold More than 91% sold

16 Shipping: **\$69.95** Economy Shipping | [See details](#)  
Item location: Blaine, Washington, United States  
Ships to: United States, Canada [See exclusions](#)

17 Delivery: Estimated between Fri, Sep. 25 and Mon, Sep. 28


18 

12 **ebay** Shop by category  All Categories

13 [Back to search results](#) | Listed in category: eBay Motors > Parts & Accessories > Car & Truck Parts > Exhaust > Exhaust Pipes & Tips

14

15 ☒ This fits a Ford

16 

17 **OEM For 2011-2014**

18 **For 11-17 F250/350 6.7L Powerstroke 4" DPF/CAT Pipe 857nb & EGR Delete kit**

19 1 viewed per hour

20 Condition: **New**

21 Compatibility: [See compatible vehicles](#)

22 Quantity:  3 available / 5 sold

Price: **US \$226.99**  
[No interest if paid in full in 6 mo on \\$22+\\*](#)

Best Offer:

☐ 1-year accident protection plan from SquareTrade - \$29.99

☐ 10 minute call for repair assistance with a certified technician - \$14.95

Limited quantity remaining More than 61% sold Free shipping and returns

Shipping: **FREE** Standard Shipping | [See details](#)

1YEAR WARRANTY/US STOCK SAME DAY DISPATCH



1  
2 The Block Plates and Exhaust Pipes do not replace, defeat, or render inoperative  
3 a motor vehicle's DPF, DOC, SCR, or NAC. Jerry Black Decl. ¶ 20. The Block Plates  
4 and Exhaust Pipes are only sold in maintenance kits to be used as part of a maintenance  
5 kit or maintenance tool. Jerry Black Decl. ¶ 21. Once completion of the maintenance  
6 procedure the motor vehicle's emission systems operates according to the OEM's  
7 design. Jerry Black Decl. ¶ 22.

8 The DPF Emulator (GBZ-DD30) is a device that is used as a temporary  
9 procedure and is fully reversible for temporary DPF maintenance for trucks equipped  
10 with DPF filters. Jerry Black Decl. ¶ 23. The DPF Emulator is a device that is used in  
11 conjunction with the Block Plates and Exhaust Pipes. Jerry Black Decl. ¶ 24. Similarly,  
12 the DPF Emulator is a temporary procedure that is used for maintenance or repair of a  
13 motor vehicle's emission system and is unplugged upon completion of the procedure,  
14 thus resulting in the proper functioning of a motor vehicle's OEM emission control  
15 system. Jerry Black Decl. ¶ 25. The DPF Emulator, a product commonly sold and  
16 readily available on eBay,<sup>6</sup> and functions to reset and clear trouble codes for  
17 maintenance purposes. Jerry Black Decl. ¶ 26. The GBZ-DD30 harness does Signal  
18 Emulation to facilitate maintenance procedures. The GBZ-DD30 (DPF Emulator) does  
19 not override, delete nor render inoperable a motor vehicle's OEM's emission system.  
20 Jerry Black Decl. ¶ 27.

21  
22 <sup>6</sup> <https://www.ebay.com/itm/N-DPF-DELE-E-SMARTY-TOUCH-S2G-For-1998-5-2018-DODGE-RAM-CUMMINS/122138262463?hash=item1c7001fbbf:g:3U8AAOSwTA9X3YxG>

1 As for Gear Box's tune products, it was only until EPA's motion did the EPA  
2 identify which Gear Box tune products the EPA alleges to violate the CAA. The  
3 products listed in Exhibit 4 of EPA's motion are GBZ-FD40, GBZ-FED40, GBZ-  
4 GM40, GBZ-GME40, and GBZ-EM1.0 which the EPA alleges are tunes.

5 To begin the analysis, the EPA's reference to tune device is not accurate. Other  
6 products that are referred to as "Tunes" that make changes to a vehicle, are called  
7 "tuners." Tuners modify and override emissions-related calibrations with other OEM  
8 Calibrations. "Tunes" on the other hand, are generally understood in the industry as  
9 Calibration (MAP data changes) software.

10 With that being said, Gear Box's products referred by the EPA as "Tunes" are  
11 not tuners. Gear Box does not manufacture nor sell tuners. Jerry Black Decl. ¶ 28. The  
12 only products listed by the EPA that are *actually* Tunes are GBZ-FED40, GBZ-  
13 GME40 and such products are referred to hereinafter as "Tunes." GBZ-FD40, GBZ-  
14 GM40 and the GBZ-EM1.0 are customizable monitor and gauge system devices used  
15 for customizable diagnostic trouble code reading. Jerry Black Decl. ¶ 29. The GBZ-  
16 FD40, GBZ-GM40 and GBZ-EM1.0 are *not* Tunes as alleged by the EPA. Jerry Black  
17 Decl. ¶ 30. The Tunes are the "*add-on*" or "*plus*" portion of the maintenance kit. Jerry  
18 Black Decl. ¶ 31.

19 The EPA's allegation that Gear Box Tunes "defeat emission controls" is entirely  
20 baseless. Gear Box's Tunes are Calibration Data from previous OEM firmware. The  
21 Tunes temporarily turn off certain emission related codes and subsystems in order to  
22 adequately go through the process to repair an emission system that has failed. Jerry

1 Black Decl. ¶ 32. Gear Box's Tunes change the vehicle's computer output as part of  
2 maintenance procedures and ALL changes are temporary. Jerry Black Decl. ¶ 33. The  
3 Tunes manufactured and sold do not replace nor override a motor vehicle's Certified  
4 Stock Calibrations. Jerry Black Decl. ¶ 34. The Tunes are a monitoring system and  
5 used as a maintenance tool to assist repairs related to problems with a motor vehicle's  
6 DPF filter. Jerry Black Decl. ¶ 35. The Tunes are not intended to modify a motor  
7 vehicle's Certified Stock Calibrations. Gear Box does not have the software from the  
8 OEM required to override nor modify a motor vehicle's Certified Stock Calibrations.  
9 Jerry Black Decl. ¶ 36. The Tunes also do not modify, replace or override a motor  
10 vehicle's OBD system. Jerry Black Decl. ¶ 37. The Tunes do not prevent the  
11 generation of diagnostic trouble codes nor prevent the malfunction indicator light from  
12 illuminating. Jerry Black Decl. ¶ 38. The Tunes work with a motor vehicle's OBD  
13 system while in maintenance mode as a temporary procedure fully reversable upon  
14 completion. Jerry Black Decl. ¶ 37. The Tunes are basically a version of firmware  
15 from the OEM and any calibration data (Mapping tables) comes from OEM's stock  
16 files. Jerry Black Decl. ¶ 39.

17 The Tunes do NOT disable the Diagnostic Trouble Code system. Jerry Black  
18 Decl. ¶ 40. The Tunes are just MAP data. The product turns off certain codes  
19 temporarily for the maintenance procedure. Jerry Black Decl. ¶ 41. The Tunes are  
20 designed for maintenance and testing on test platforms, such as Dyno testing.<sup>7</sup> The  
21

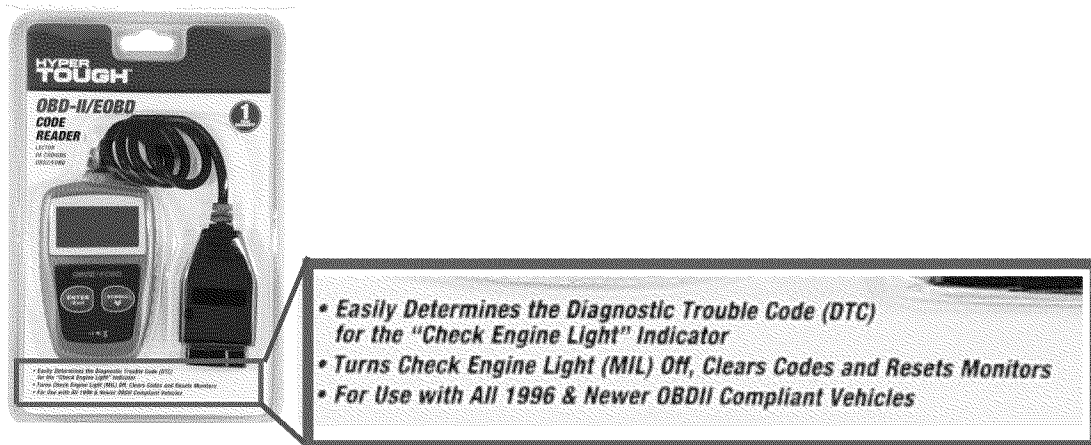
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22 <sup>7</sup> Dyno testing fosters proper engine break-in procedures and makes it easy to spot and correct potential problems ranging from valve train issues to simple oil leaks.

products also turns off certain codes temporarily for long-term testing which allows the vehicle to operate without the emission systems thereby effecting the procedures. (e.g. Alternate Fuels with different emission standards). Jerry Black Decl. ¶ 42.

In addition, some maintenance requires the vehicle to operate without these faults' codes and shutdown functions, while the DPF filter and other parts are being cleaned in order to eliminate other faults that might cause emission readiness tests to fail.<sup>8</sup>

Turning off the codes allow you to set priority levels which allows a vehicle to be moved or relocated for repairs. Jerry Black Decl. ¶ 43. Any common DTC code reader readily available on the market will clear ALL codes, including emission related codes.<sup>9</sup> The function of "reading and clearing codes" is what any common code reader is designed to accomplish. See below.



The CAN standard for Controller Area Network is a standard component on all new vehicles. Jerry Black Decl. ¶ 44. It is the network used to communicate with the

<sup>8</sup><https://www.troublecodes.net/fordcodes/p1000/#:~:text=OBD%20II%20fault%20code%20P1000,cycle%20of%20all%20readiness%20monitors.>

<sup>9</sup> <https://www.walmart.com/ip/Hyper-Tough-HT309-OBD2-Scan-Diagnostic-Tool-Code-Reader-Red/54620271> (See promotional statements on the front of the packaging)

1 many different computers located within the vehicle. The main computer (PCM) is the  
2 primary processor that monitors a vehicle's emission systems. Jerry Black Decl. ¶ 45.  
3 It could be argued by the EPA that with a firmware change could emulate a vehicle's  
4 ECU. However, none of Gear Box products do "CAN Bus emulation." Jerry Black  
5 Decl. ¶ 46. The EPA misunderstands how the Tunes work and their capabilities.

6 All mapping table modifications come from the OEM's previous firmware  
7 which are certified by the manufacture as described in 40 C.F.R. 86.1844-01(g)(6).  
8 Any modification to the binary image is temporary for repair while in maintenance  
9 mode. Jerry Black Decl. ¶ 47.

10 The Tunes and exhaust system components are part of maintenance kit that  
11 allows for the temporary removal of emissions related parts and then is removed upon  
12 completion of the procedure, resulting in the proper functioning of the vehicle's OEM  
13 emission system.

14 As stated above, Gear Box has always advertised and maintained that its  
15 products be used for legal purposes, such as maintenance and repair, and are fully  
16 reversable in order to restore the proper functioning of a motor vehicle's emission  
17 control system to its original design. Jerry Black Decl. ¶ 48. The EPA fails to show that  
18 Gear Box's products are illegal.

19 The EPA's allegation that Gear Box knew or should have known that its  
20 products were being used for an illegal purpose is baseless. The EPA uses the term  
21 "defeat" and "delete" as though it means to render the vehicle's emission system  
22 inoperative in violation of the CAA. The term "defeat" and "delete" are industry terms

1 that mean “remove temporarily.” The terms do not mean that a vehicle’s emission  
2 system cannot be restored to its original design after the temporary procedure is  
3 complete.

4 The EPA cannot succeed on the merits solely because Gear Box’s products  
5 *could* be used in a manner that violates the CAA. See *MGM Studios, Inc. v. Grokster,*  
6 *Ltd.*, 259 F. Supp. 2d 1029, 1046 (C.D. Cal. 2003). In *MGM*, the court held that  
7 liability is not based on the fact that a product could be used for an unlawful purpose  
8 when there is no control over the end user.

9 Gear Box is not liable for the unlawful use of its products where Gear Box has  
10 no control over the end user. Gear Box’s customer list includes auto dealers, auto  
11 repair & maintenance shops, auto wholesalers and manufacturers that use Gear Box’s  
12 products for legal purposes. Gear Box has always maintained that its products be  
13 strictly used in accordance with all applicable federal, state and local laws. Jerry Black  
14 Decl. ¶ 49. Gear Box cannot control the end user of its products nor can Gear Box  
15 control any representations (via media or otherwise) made by its customers.

16 Gear Box has always stressed to its customers, employees and salespersons that  
17 its products are to be used strictly in compliance with EPA regulations. Jerry Black  
18 Decl. ¶ 50. Gear Box’s customers are entirely outside of the Gear Box’s control. Gear  
19 Box has no ability to supervise nor control the end user that may or may not use its  
20 products for an illegal purpose. The EPA’s allegation that Gear Box knows or should  
21 know that its products were being installed illegally is without merit. If the EPA  
22

1 believes the Gear Box's products are used illegally, then the EPA should seek fines  
2 from the end user found to be using such product illegally.

3 In addition, the EPA does not consider other exceptions to the CAA for which  
4 Gear Box' products may be used for. These exceptions include:

5 1) actions performed in accordance with high altitude adjustment instructions  
6 pursuant to U.S.C. § 7549(a)(1);

7 2) motor vehicle engines intended solely for export under U.S.C. 42 §  
8 7522(b)(3);

9 3) motor vehicle engines used for research, investigations, studies,  
10 demonstrations, or training in accordance with 40 CFR 1068.210;

11 4) motor vehicles owned by an agency of the Federal Government responsible  
12 for national defense under 40 CFR 1068.225(1);

13 5) motor vehicles used solely for competition pursuant 40 CFR 1068.235; and,

14 6) emergency motor vehicles manufactured primarily for the use in medical  
15 response, law enforcement and fire protection where emission standards do not apply.

16 Furthermore, a preliminary injunction "is subject to heightened scrutiny and  
17 should not be issued unless the facts and law clearly favor the moving party." *Dahl v.*  
18 *HEM Pharm. Corp.*, 7 F.3d 1399, 1403 (9th Cir. 1993).

19 "The burden of demonstrating that a preliminary injunction is warranted is a  
20 heavy one where . . . granting the preliminary injunction will give plaintiff substantially  
21 the relief it would obtain after a trial on the merits." *Dakota Indus. v. Ever Best, Ltd.*,  
22 944 F.2d 438, 440 (8th Cir. 1991).

1 The EPA will not succeed on the merits because the EPA cannot show that the  
2 facts or law are in its favor. The facts favor Gear Box because its products are sold for  
3 a lawful purpose in maintaining and repairing a motor vehicle's faulty emissions  
4 system. The law is in Gear Box's favor because the CAA does not prohibit the act of  
5 any temporary procedure used for the maintenance and repair, and upon completion,  
6 results in the proper function of a vehicle's OEM emission system.

7 In addition, the EPA's motion for preliminary relief is not based upon a  
8 complete record. Depositions have not been conducted and the EPA bases its claims  
9 and allegations on the declarations of potential experts that have not demonstrated their  
10 qualifications nor been subject to cross-examination. The areas of expertise which  
11 these declarants offered are complex factual disputes that are difficult to resolve at this  
12 time of litigation.

13 Gear Box's products are used in a manner that is in accordance with the CAA.  
14 There are numerous applications wherein Gear Box's products enter the stream of  
15 commerce and are used for legal purposes. Therefore, the EPA is not likely to succeed  
16 on the merits and its motion for a preliminary injunction should be denied.

17 **II. Irreparable Harm.**

18 The EPA's argument that it will suffer irreparable harm is flawed for several  
19 reasons.

20 First, the basis of EPA's argument regarding irreparable harm alleges that all of  
21 Gear Box's products are used for an illegal purpose for the remaining life of an altered  
22 vehicle. The EPA's argument is flawed because it fails to consider that Gear Box's



1 products are used as a temporary procedure to repair a motor vehicle's failing  
2 emissions system. The EPA's argument is based solely upon such products being used  
3 for illegal purposes for the remaining life of the vehicle. If anything, irreparable harm  
4 would result in the inability to repair a vehicle's failing emission system. An emission  
5 system that remains in its faulty condition would generate excess emissions and cause  
6 harm the EPA claims is irreparable.

7 Second, "a party requesting a preliminary injunction must generally show  
8 reasonable diligence." *Benisek v. Lamone*, 138 S. Ct. 1942, 1944, 201 L.Ed.2d 398,  
9 400 (2018). Thus, a "Plaintiff's long delay before seeking a preliminary injunction  
10 implies a lack of urgency and irreparable harm." *Oakland Tribune, Inc. v. Chronicle*  
11 *Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985).

12 "There must be conscience, good faith, and reasonable diligence, to call into  
13 action the powers of the court." *Holmberg v. Armbrrecht*, 327 U.S. 392, 396, 66 S. Ct.  
14 582, 584 (1946).

15 Here, the EPA did not file suit for more than two years after the EPA sent its  
16 NOV to Gear Box. It was not until the EPA learned that Gear Box obtained a PPP  
17 Loan did the EPA seek for a preliminary injunction. Gear Box's financial ability to  
18 continue its course of business in the midst of a pandemic does not give the EPA the  
19 "green-light" to seek for injunctive relief. The EPA could have sought for injunctive  
20 relief immediately after the NOV, which it did not. Most of EPA's allegations stems  
21 from documents it was provided in 2016. The EPA could have sought a preliminary  
22

1 injunction much earlier and its sole reason for seeking injunctive relief now was its  
2 discovery that Gear Box obtained a PPP Loan.

3 The EPA's delay in seeking a preliminary injunction nearly three years after  
4 issuing the NOV, shows that irreparable harm weighs against the EPA and it can wait  
5 until the case is decided on the merits at trial.

6 Third, "[a]n irreparable harm is one that cannot be redressed by a legal or  
7 equitable remedy following trial." *Optinrealbig.com, LLC v. Ironport Sys.*, 323 F.  
8 Supp. 2d 1037, 1050 (N.D. Cal. 2004).

9 The EPA cannot show irreparable harm because the EPA has both legal and  
10 equitable remedies available upon the conclusion of trial. The EPA can show a legal  
11 remedy, such as civil fines, that are calculated in accordance with 40 CFR 19.4. The  
12 EPA also has an equitable remedy upon the conclusion of trial, if successful, by  
13 enjoining Gear Box from selling its products under 42 U.S.C. § 7523. Therefore, the  
14 EPA's claim that it will suffer irreparable harm if Gear Box is not enjoined from  
15 selling its products is without merit.

16 **III. Balance of Hardships.**

17 "The basic function of a preliminary injunction is to preserve the status quo  
18 pending a determination of the action on the merits." *Chalk v. United States Dist. Court*  
19 *Cent. Dist.*, 840 F.2d 701, 704 (9th Cir. 1988).

20 "Status quo is defined as the last, uncontested status which preceded the pending  
21 controversy." *Susanville Indian Rancheria v. Leavitt*, No. 2:07-cv-259-GEB-DAD,  
22

1 2007 U.S. Dist. LEXIS 18702, at \*21 (E.D. Cal. Feb. 28, 2007) (quoting *Regents of the*  
2 *Univ. of Cal.*, 747 F.2d 511, 514 (9<sup>th</sup> Cir 1984).

3 The preliminary injunction sought here does not aim to preserve the status quo,  
4 but rather changes the status of the parties drastically. The injunction sought here  
5 requires Gear Box to actively suspend most, if not all, of its business operations.

6 The preliminary injunction would also place serious doubts on repayment of the  
7 PPP Loan, thereby costing the United States hundreds of thousands of dollars that  
8 Congress allocated for small businesses like Gear Box. The purpose of a PPP Loan is  
9 for small businesses to continue amidst the current pandemic. The EPA waited nearly  
10 three years to file an injunction after its NOV. Waiting another year for trial, does not  
11 compare to the hardship the EPA seeks to impose on Gear Box by suspending its  
12 lawful business operations. Denial of the preliminary injunction is not a final decision  
13 for the EPA. The granting of the preliminary injunction would however, result in grave  
14 hardship to Gear Box. The preliminary injunction would have the effect of a final  
15 decision on Gear Box without trial.

16 Therefore, the EPA's motion for preliminary injunction seeking to enjoin Gear  
17 Box from manufacturing and selling its products changes the status quo, causing  
18 serious financial harm to Gear Box, and therefore should be denied in its entirety.

19 **IV. Public Interest**

20 Here the public interest tips far in Gear Box's favor. There is an obvious public  
21 interest in the need to maintain and repair a motor vehicle's failing emissions and  
22 related systems. The CAA does not prohibit devices used for the purpose of repair or

1 replacement of the device or element, and upon completion of the temporary  
2 procedure, results in the proper functioning of the device or element.

3 Here, Gear Box's products are primarily used for the "maintenance exception"  
4 which are not prohibited under the CAA. Maintenance or repair of a faulty emission  
5 system is an everyday common procedure that is done in thousands of auto repair shops  
6 across the United States. The maintenance kits are temporary procedure used for repair  
7 or maintenance of an emission system, and upon completion, are restored to its proper  
8 function as intended by the OEM. Most vehicles need to temporarily remove its  
9 emission system to repair other portions of the vehicle. Jerry Black Decl. ¶ 51.

10 Any repair to a faulty emission system requires the temporary removal or  
11 disabling of the OEM's emission system to adequately diagnose and make the  
12 appropriate repair. Jerry Black Decl. ¶ 52. Without a temporary procedure, a vehicle's  
13 faulty emission system would be more costly and time-consuming to repair. Jerry  
14 Black Decl. ¶ 53. A vehicle's faulty emissions system that does not operate as intended  
15 by the OEM would cause more harm to the environment if it were to remain in its  
16 faulty condition.

17 Motor vehicles, specifically diesel trucks, that operate in their faulty condition  
18 can cause more harm to the environment by its potential to cause fires.<sup>10</sup> An  
19 unrepairable DPF filter and related exhaust system puts the public safety at risk by  
20 causing an unexpected fire.<sup>11</sup> The public interest is better served by maintaining and

21 \_\_\_\_\_  
22 <sup>10</sup> <https://axi-international.com/dpf-diesel-particulate-filter-or-dangerous-potential-fire/>

<sup>11</sup> <https://www.nbcbayarea.com/news/local/bay-legal-truckers-sue-ca-again-claiming-air-filter-puts-public-safety-at-risk/36208/>

1 repairing a motor vehicle's faulty DPF filters then to allow it to remain in operation  
2 unrepaired. Gear Box's products further allow the maintenance or repair shop to easily  
3 repair and/or maintain a motor vehicle's failing emission system thereby keeping  
4 maintenance costs low. Jerry Black Decl. ¶ 53.

5 Furthermore, DPF emission filters are commonly known to render a vehicle  
6 inoperative while driving on the public streets and highways. "A common issue with  
7 DPF systems is the deactivating of cleaning cycles because of untimely regenerations  
8 leading to the build-up of soot and particulate which can clog the filter [which] can  
9 disable a vehicle, and leave operators stranded."<sup>12</sup> There is a valuable public need for  
10 removing and repairing in inoperable vehicle off the public highway or street when its  
11 emission system fails for the public safety of all drivers. The public interest is best  
12 served by allowing Gear Box to continue selling products that are needed to maintain  
13 and repair faulty emission and related systems.

### 14 **CONCLUSION**

15 Plaintiff's Motion for a Preliminary Injunction enjoining Gear Box from selling  
16 any of its products listed in Plaintiff's Attachment A be denied in its entirety. The EPA  
17 has failed to show a likelihood of success on the merits because Gear Box's products  
18 clearly qualify and are used under the "maintenance exception," and are not prohibited  
19 by the CAA. Gear Box's products are used as a maintenance tool or kit. The products  
20 are temporary and, after the procedure, are fully reversible resulting in the proper  
21

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22 <sup>12</sup> <https://www.abc.net.au/news/2019-11-08/diesel-filter-problems-in-australian-cars-widespread/11655040>.  
(quoting <https://axi-international.com/dpf-diesel-particulate-filter-or-dangerous-potential-fire/>).

1 function of an emission system as intended by the OEM. Gear Box's products are also  
2 exempt when used for several enumerated exceptions, such as military vehicles,  
3 emergency vehicles and vehicles used solely for competition (racing).

4 Furthermore, the EPA's motion should also be denied because it failed to show  
5 reasonable diligence and good faith. The EPA sought a preliminary injunction only  
6 after discovering that Gear Box obtained a PPP Loan. The EPA waited nearly three  
7 years to file its motion after it had information regarding an alleged violation. In  
8 addition, the preliminary injunction would not result in the status quo, but would  
9 change the status of the parties causing substantial hardship on Gear Box.

10 Finally, the public interest is served by the denial of the preliminary injunction  
11 because there is a great public interest in the need to repair and maintain diesel vehicles  
12 that are, and will be, in need of repair and maintenance of its emission systems.  
13 Therefore, EPA's Motion for Preliminary Injunction should be denied.

14 Pursuant to Local Rules of Civil Procedure Rule 7.1(b)(2), a proposed order is  
15 attached hereto.

16 DATED this 21<sup>st</sup> of September 2020

17 **THE BARLOW LAW FIRM, LLC**

18 /s/ Matthew I. Barlow

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21 *Attorney for Defendant*

**CERTIFICATE OF SERVICE**

I hereby certify that on September 21<sup>st</sup>, 2020, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF system for filing and transmittal of Notice of Electronic filing to the following CM/ECF registrants:

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